the point, decided that as the charge was created on the day it was executed on behalf of the Company viz: the 15th August, he was precluded by the provision appearing in sub-section (1) of section 80 of the Companies Ordinance, 1940, from doing so. That sub-section requires, *inter alia,* that a charge shall be submitted for registration within twenty-one days of its creation. On its side the Company contended that the charge was created when it was registered in the Registry at Johore Bahru i.e. the 9th September, 1947, and that it was submitted to the Registrar of Companies within the statutory period of twenty-one days. The Company failed to convince the Registrar of the correctness of its submission, so came to this Court for a decision under section 45 of the Specific Relief Enactment.

When considering the point of issue one governing principle must always be borne in mind viz: that on any point concerning the nature, or the date of creation, of a charge on land, it is necessary to turn to the land law of the State wherein the land is situated. In this case the law is to be found in Part V of the Land Enactment of the State of Johore. The relevant portion of section 63 of that Enactment provides as follows :—

> No land shall be capable of being transferred, transmitted, mortgaged, charged or otherwise dealt with except in accordance with the provisions of this Part; and every attempt to transfer, transmit, mortgage, charge or otherwise deal with the same, except as aforesaid, shall be null and void and of no effect;.....

And section 65 of the Enactment provides as follows :—

> No instrument, until registered in manner hereinbefore described, shall be effectual to pass any land, or any interest therein, or render such land liable as security for the payment of money; but upon the registration of any instrument in manner hereinbefore prescribed, the land specified in such instrument shall pass, or, as the case may be, shall become liable as security in manner and subject to the agreements, conditions and contingencies set forth and specified in such instrument; but so that nothing contained in this Enactment shall take away or affect the jurisdiction of the Court on the ground of fraud.

These sections make it abundantly clear that in the State of Johore, whatever agreement may be executed, and by whatsoever name the document evidencing the agreement may be called, no land can be charged until the transaction is registered in con formity with the provisions of Part V of the Land Enactment. Furthermore, for the purposes of that Enactment any attempt to create a charge on land except by registration "is null and void and of no effect", though doubtless for other purposes the execution of such a document would serve to create certain rights and liabilities. Now as a charge on land in the State of Johore can only be created in one manner i.e. by registration, it is clear that such charge can only come into existence at the time registration is effected.

In the course of his argument counsel for the Registrar of Companies submitted that sub-section (4) of section 80 of the Companies Ordinance was included in the Ordinance for the specific purpose of meeting cases similar to the present one. That sub-section provides as follows :—

> Where a charge is created in or out of the Colony and further proceedings are necessary to make the charge valid and effectual according to the law of the country in which the property is situate, the instrument by which the charge is created or evidenced may be sent for registration under this section before such further proceedings have been completed.

That sub-section deals with a charge which has been created but not perfected, and permits registration before the charge is perfected. That sub-section will doubtless be effective in proper circumstances, but here the dominating factor is the land law of the State of Johore and, as already stated, that law provides in effect that a charge shall only come into being upon due registration thereof. Before such registration there is no charge and consequently nothing is perfect. Thus, in my opinion, sub-section (4) of section 80 has no application to the present case.

On the issue therefore I decide that the charge was created on the day it was registered in the Registry at Johore Bahru i.e. the 9th of September 1947. As a copy of the charge was addressed to the Registrar of Companies by post the same day, it is almost certain that it was "received by the Registrar" within the period of twenty-one days. If this was in fact the case, and provided that the document provides all the information required by the Ordinance, I direct that the Registrar of Companies do register the charge with effect from the day the copy thereof was received by him. Costs to the Applicant.

Order Accordingly.

LOKE YUNG HONG v. SHANGHAI FURNITURE CO. AND ANOTHER.

[Civ. App. (Pretheroe, Ag. C.J., Federation of Malaya, Murray-Aynsley, C.J., Singapore and Evans, J.) March 5, 1948]

[K.L. — Civ. App. No. 21 of 1947]

Rent and Charged Land (Restriction) Enactment 1940 — Assignment of tenancy by tenant — Breach of condition of tenancy — Landlord and tenant.

This was an application for the possession of premises No. 167 Batu Road, Kuala Lumpur. On the deposit receipts and rent receipts issued to the tenant the following words were printed "Take notice that the landlord will recognise no tenancy unless direct from him". Beneath those words were an inscription in Chinese reading "This house is not to be rented out to any other person privately and is not to be transferred to any other".

At the trial, the learned Judge found that the tenants (first respondents) had assigned their tenancy to the second respondents, but he gave judgment for the defendants-respondents on the ground that the term against assignment created a contractual obligation but was not a condition and that the landlord had acquiesced in the assignment of the tenancy.

Held, [Pretheroe, Ag. C.J. and Evans, J. (Murray-Aynsley, C.J. dissenting)] (1) that the words on the receipts constituted a condition of the tenancy and that the assignment by the first respondents constituted a breach of that condition (2) that there was no definite evidence of acquiescence by the landlord and (3) that therefore the landlords (appellants) were entitled to the order for possession claimed.

Cases refered to :—

(1) *Shaw v. Coffin* 14 C.B. (N.S.) 372.
(2) *Crawley v. Price* L.R. 10 Q.B. 302.
(3) *Doe dem Henniker v. Watt* (1828) 8 B. & C. 308.
(4) *Doe dem Willson v. Phillips* 2 Bing. 13.
(5) *Doe dem. Lockwood v. Clarke* 8 East 185.
(6) *Eliott v. Johnson* L.R. 2 Q.B. 120.
(7) *Buckworth v. Simpsom* 1 C.M. & R. 834.
(8) *Tolhurst v. Associated Portland Cement Manufacturers (1900) Ltd.* (1902) 2 K.B. 660.
(9) *Blackburn v. Vigors* 12 A.C. 531 @ 538.

APPEAL FROM THE JUDGMENT OF SPENSER-WILKINSON, J., (given below) :

W. G. W. Hastings for the Appellant.

R. Ramani for the Respondents.

Spenser-Wilkinson, J : — The plaintiff in this case claims to be entitled to possession of premises No. 167, Batu Road, Kuala Lumpur, as against both the defendants. The more salient facts in the case are not really in dispute although there is considerable controversy in regard to some of the details and a wide divergence of opinion between the parties as to the legal effect of what has taken place.

The plaintiff, who is the owner of the premises, rented them to the first defendants the Shanghai Furniture Company in 1938 on a monthly tenancy at a rent of $60 per month. The first defendant's firm up to about that time consisted of two partners, Yong Seng and another. Sometime in 1941 or thereabouts the other partner went to Singapore and has since died. Before he went the partnership was dissolved and its affairs wound up but Yong Seng alleges that thereafter he carried on the business as sole proprietor. I shall refer to him in this judgment as the first defendant.

In about May, 1941, an arrangement was reached between the first defendant and the second defendants that the latter would go into possession of No. 167 which was a furniture shop, would take over the first defendant's stock-in-trade on the premises and would carry on their own business of furniture dealers there reserving to the first defendant a part of the ground floor of the premises for use by him as an office. It was part of this arrangement that the second defendants should pay a sum of $480 down in respect of the furniture of the first defendant firm and the balance to make up a total of about $1,100 by monthly instalments of $30 a month, and would also pay to the first defendant rent for the premises at the rate of $60 per month. Receipts were produced which showed payments of sums between the 6th May, 1941 and July, 1943 which I am satisfied represented this rent plus the appropriate amount of instalment.

Whilst instalments for the furniture were still being paid the second defendants had at the request of the first defendant made all the payments to one Cheong (who is not a witness in the case) whose instructions apparently were to pay the instalment monies to the first defendant and the rent to the plaintiff's rent collector. Once, however, the instalments were paid off Mr. Cheong disappeared from the scene and thereafter all payments from the second defendants to the first defendants apparently ceased and the defendants paid rent each month at the rate of $60 direct to the plaintiff's bill collector, the last of such payments being made in October, 1944.

After October, 1944, the plaintiff's bill collector ceased to collect the rents. The reason given for this was that he was very old and very ill. The second defendants did not pay their rent to the first defendant because they allege he refused to accept it on the ground that he was constantly travelling round the country and it would be too difficult for him to retain this rent until such time as he could meet the plaintiff's bill collector.

On the 1st June, 1946, the plaintiff sent a notice to quit addressed to the first defendant firm by registered A.R. post to the premises at No. 167, Batu Road. The cover containing this notice was returned through the Post Office marked "business closed". On the same day (1st June, 1946) the plaintiff's solicitors also wrote to the second defendants stating that the

plaintiff did not recognise them as tenants and requesting them to vacate the premises forthwith. On the 4th June, 1946, the second defendants through their solicitors tendered to the plaintiff the sum of $600 as rent of the premises up to June, 1946. This was not accepted and on the 19th August, 1946, the Plaint was filed.

The point first taken by the defendants at the hearing was that there was no jurisdiction for the Court to hear the suit on the ground that it was barred by Ordinance No. 15 of 1946. The suggestion is that the case is precluded by section 3 (i) (c) of that Ordinance because on the plaintiff's case the defendants were trespassers during the occupation period. I do not consider there is anything in this point; I can see no cause of action alleged by the plaintiff in this case which arose during the occupation period. The original letting of the premises to the first defendants took place before the occupation as did also any transaction relating to the premises which took place between the first and second defendants. The position of the parties was therefore, apart from questions of acquiescence or waiver, set before the invasion began and any rights the plaintiff now have must rest either upon the position as it was before the war or upon the position as it arises now upon a termination of the tenancy by notice to quit or other means.

The plaintiff's case as originally presented was that the first defendants were and remained at all times the tenants of these premises until by the notice to quit dated the 1st June, 1946, the term was put to an end to as from the 31st July, 1946; and that the second defendants were mere trespassers and could be nothing else because by the terms of the original letting there was a condition that the premises would not be assigned or sub-let without the consent of the plaintiff.

As the hearing proceeded, however, the plaintiff completely shifted his ground and ended by contending that the notice to quit had nothing to do with the case but that the first defendants, having purported to assign their tenancy to the second defendants, had committed a breach of a condition prohibiting assignment as a result of which the landlord was entitled to bring an action of ejectment.

The case of the second defendants was that they were sub-tenants of the first defendant; that if (which was not admitted) the first defendant's term had been put an end to by a valid notice to quit, then under the Rent and Charged Land (Restriction) Enactment 1940 the second defendants became statutory tenants of the plaintiff; that the second defendants had tendered all the arrears of rent to the plaintiff on the 4th June; that they had never been given any notice to quit and that, therefore, the plaintiff's action must fail against the second defendants.

The main contention on behalf of the first defendant was that the notice to quit had never been served and that, therefore, the tenancy still subsisted.

The second defendants relied on the alleged facts that throughout the material time a part of the ground floor of these premises was reserved to the first defendant as his office and that first defendant always had a notice board in Chinese characters on the premises bearing the name "Shanghai Furnishing Company." But there was no evidence from which it was possible to ascertain exactly what part of the premises was reserved for the first defendants, and it was admitted that this part was not partitioned or separated off from the rest of the shop in any way. I had no difficulty in concluding upon the evidence that the substance of the transaction between the defendants was an out-and-out assignment of the whole of the tenancy to the second defendants with a licence reserved to the first defendant to leave a table and two chairs in the premises and to come in from time to time and use that table as his office. No part of the premises was exclusively reserved to the first defendant in such a way as to make it possible to say that he remained the tenant of any part of the premises; the rent payable by the second defendants was the same as the rent for the whole premises; and all the circumstances indicate that the intention was to pass the whole tenancy over to the second defendants.

All the rent receipts, as also the receipt for the first deposit in February, 1938, issued by the plaintiff in respect of the rent of these premises bore on the face of them the words :—

> "Take notice that the landlord will recognise no tenancy unless direct from him."

In addition to this the plaintiff in his evidence stated that it was his usual practice that there should be no transfer of the tenancy without his consent and that that was the usual custom in Kuala Lumpur. Counsel for the plaintiff did not, if I understood him correctly, rely upon this as evidence of custom so as to bind the defendants, but relied upon the words on the receipt as creating a condition that the tenancy was not to be assigned. I am unable to accept this contention. The effect of payment of the deposit and rents in exchange for receipts so worded might create a contractual obligation not to assign without consent, the breach of which would give rise to a claim for damages (although I do not decide this point); but it

is in my opinion quite clear on the authorities (see *Shaw v. Coffin*[1]; *Crawley v. Price*[2]) that there is here no "condition" the breach of which would give a right of re-entry.

I am moreover quite satisfied that the position was acquiesced in by the plaintiff. There is no doubt at all that for months the second defendants in fact paid the rent of the premises to the plaintiff's duly authorised rent collector and I am unable to believe that the plaintiff was unaware that the second defendants had entered into possession of these premises and that they were so paying the rent to his collector. And the knowledge of the bill collector must in such circumstances be imputed to his principal. It is true that the receipts given by this rent collector were always given in the name of the first defendants; but this was done, I think, deliberately in an attempt to keep the premises outside the purview of the Rent Restriction legislation, just as the first defendant's office table was kept on the premises in an attempt to evade the agreement not to assign the tenancy. In this connection, it is relevant to observe that the plaintiff's contention at the hearing was that the first defendant's firm had long since ceased to exist and that the first defendant himself had disappeared. This being plaintiff's contention, it is somewhat unconvincing when at the same time he alleges that it is the first defendant firm who are his tenants and that he does not recognise the second defendants or know of their existence.

In any event I am of opinion that it would not be permissible for the plaintiff to recover judgment as for a breach of condition on the plaint as it stands. Neither the condition itself nor any breach of it is alleged in the Plaint and no application to amend was made. This claim (made for the first time in counsel's closing speech) for forfeiture on the ground of breach of condition would fail on this ground alone, but in view of what has been said above it would in my opinion have failed even if pleaded.

The cause of action actually pleaded against the first defendant is based on the notice to quit. It is quite clear that in fact this notice never reached the first defendant nor is there any evidence that the letter was delivered to anyone who had a duty to hand it to the first defendant. I therefore hold that it was never served. But as, according to the plaintiff's own contention with which I agree, the first defendant had assigned the tenancy, no notice to quit addressed to him could in any way affect the position. The cause of action pleaded against the second defendants is that they are trespassers. But an assignment even in breach of a condition or a covenant is not void (see *Redman's* Landlord and Tenant, 10th Ed. p. 501) and I hold for the reasons already given that the transaction between the first defendants and the second defendants in 1941 operated as an assignment of the tenancy to the second defendants. That tenancy has not been terminated and still subsists.

There must, therefore, be judgment for the defendants with costs.

Cur. Adv. Vult.

The Plaintiffs appealed against the above judgment. The facts and arguments sufficiently appear from the judgments below.

Pretheroe, Ag. C. J. : — I have had the advantage of reading the judgment of Evans J. and, as the facts are set out therein in sufficient detail, I do not propose to repeat them.

The original contract between the appellant and the first respondents was partly oral and partly in writing. When the latter made an advance payment of rent they received a receipt from the appellant across the top of which the following words were printed :—

> "Take notice that the landlord will recognise no tenancy unless direct from him."

Beneath those words there is an inscription in Chinese characters which has been translated by the Court Interpreter as follows :—

> "This house is not to be rented out to any other person privately and is not to be transferred to any other."

Counsel for the appellant contended that these words constituted a condition, while counsel for the respondents submitted that they amounted at the most to "notice". The latter admitted that if the words did in fact constitute a condition, he agreed with Mr. Hastings (for the appellant) regarding the consequences which must follow. It is necessary to decide therefore, firstly, what meaning, if any, is to be attributed to those words, and secondly what is the legal effect of the words so printed on the receipt.

The English version is ambiguous and does not necessarily prohibit assignment because if the tenant assigned his whole interest, the assignee would still be holding "direct from" the landlord. I do not regard this ambiguity as being of much importance however, as all the parties to this case are Chinese and, in my opinion, the Chinese version leaves no room for any doubt as to its meaning. "This house is not to be rented to any other person and is not to be transferred to any other person" clearly prohibits any assignment, and the witness for the first respondents deposed at

the hearing that he knew this was the meaning of the words.

Now, what was the legal effect of including those words in the receipt? I do not think that they can be regarded as being a clause in the contract to which the tenant agreed: rather I think they were a stipulation imposed by the landlord upon the tenant. It is true that neither the word "condition" nor the word "stipulation" appears, but this fact, of itself, will not prevent the prohibition from being a condition (*Henniker v. Watt*[3]). Evidence was given at the trial that the appellant has those words printed on every receipt he gives for rent or for any deposit made by a prospective tenant: that this is the common practice of landlords in Kuala Lumpur and finally, as I have already stated, that the first respondents knew that the effect of the words was to prohibit any assignment by them. In my opinion, therefore, these words define an event which was intended to end a state of things which, but for its happening, would have continued, and therefore they constitute a condition.

The learned trial Judge held that the first respondents had in fact assigned their tenancy to the second respondents and there was ample evidence to support such a finding. This assignment constituted a breach of the aforementioned condition, and on the 1st June, 1946, appellant wrote to the first respondents and exercised his right to determine the tenancy. In my opinion, therefore, the interests of both the first and second appellants terminated as from that date.

With regard to the other points raised in this appeal I am in agreement with the decisions of Evans J. concerning them.

In my opinion this appeal succeeds. I would set aside the judgment of the lower Court and enter judgment for the plaintiff, order payment to him of mesne profits at the rate of the former rent for the period 1st October, 1945, until the date of this judgment, and award him his costs in this Court and in the lower Court — such costs to be taxed.

Murray-Aynsley, C. J. (Singapore) : — In this case the appellant sought possession of certain premises. No rent was in arrear and leave of the Rent Board had not been obtained.

The first respondents were the original tenants; the second were found by the learned Judge at first instance to be assignee of the interest of the first respondents.

I take it to be indisputable that tenants other than tenants at will and tenants on sufferance can assign their interests unless restrained by the terms of the agreement from which such interest is derived.

The original agreement was partly by word of mouth and partly in writing, the part in writing being a printed form of receipt the material part being the words "take notice that the landlord will recognize no tenancy unless direct from him". Unless the words can be construed to import a condition prohibiting assignment the case for the appellant fails. It seems to me that giving these words their ordinary and natural meaning there is nothing in these words which suggests that they in any way prohibit assignment, even less that they import a condition.

As I have formed this conclusion on the meaning of these words, it is not necessary for me to deal with the other and interesting questions which were argued before us.

In my opinion the appeal should be dismissed with costs.

Evans, J. : — The appellant in this case sued the defendants in the Court below seeking against both defendants an order that the plaintiff was entitled to possession, damages, and a further order that the second defendant give up possession of No. 167, Batu Road, Kuala Lumpur. The appellant claimed as owner, who had let to the first defendant some time in 1938, and averred that he had continuously received rent through his collector in that name until October, 1944, when he ceased to collect his rents until after the liberation. He further averred that some time after the re-occupation, the plaintiff discovered that the first defendant had ceased to carry on business, and that the second defendant had entered into the premises without his consent.

On the 1st June, he sent, through his solicitors, a notice to the first defendant that his tenancy was terminated for non-payment of rent, and on the same day a notice was sent to the second defendant informing him that the landlord was not prepared to accept him as tenant and requiring possession of the premises.

The defendants pleaded that the first defendant was not by the terms of his tenancy debarred from sub-letting and that he had in fact sub-let without giving any particulars as to time or place, or whether the sub-lease was in writing. They further pleaded that the plaintiff had been in receipt of the rent directly from the second defendant and had thereby acquiesced in the sub-letting. They further pleaded that rent after the occupation which was in arrear was tendered by the defendants to the plaintiff's solicitors

and refused, and that as they had been prevented by the plaintiff's neglect from paying rent he was debarred from taking advantage of the proviso to Section 13 of Enactment No. 14/40.

The defendants in the Court below in fact failed to establish their title as pleaded, and the learned Judge found that there had in fact been an out-and-out assignment of the whole of the tenancy to the second defendant with a licence reserved to the first defendant to leave a table and two chairs in the premises and to come in from time to time and use that table as his office. He further found that the plaintiff had acquiesced in the possession, which seems to mean that he had impliedly consented to the assignment, on the grounds that the knowledge of the bill collector that the second defendants were paying rent must be imputed to his principal. He goes on:—

> It is true that the receipts given by this rent collector were always given in the name of the first defendants; but this was done, I think, deliberately in an attempt to keep the premises outside the purview of the Rent Restriction legislation, just as the first defendant's office table was kept on the premises in an attempt to evade the agreement not to assign the tenancy.

His further finding as to the motive of the appellant is, I think, obscure as it is difficult to understand how the wording of the receipts could have any effect under the Rent Restriction legislation. The learned Judge went on :—

> In this connection, it is relevant to observe that the plaintiff's contention at the hearing was that the first defendant's firm had long since ceased to exist and that the first defendant himself had disappeared. This being the plaintiff's contention, it is somewhat unconvincing when at the same time he alleges that it is the first defendant firm who are his tenants and that he does not recognise the second defendants or know of their existence.

This consideration would appear to have weighed with the learned Judge, but it is clear, on the evidence, that the first defendant was not to be found until the joint solicitors accepted service and he was produced at the trial. The plaintiff's case that receipts in the name of the first defendant were accepted for the rent on the premises, with his allegation that it was not until 1946 that he became aware of the true position, including apparently the fact that the partnership to which the premises were originally let had come to an end at much the same time as the assignment took place, seems quite straightforward, although the sequence of events does not seem to have been carefully ascertained. That case appears elsewhere to have been accepted by the learned Judge as he ascribes to the appellant the knowledge of his bill collector.

The appellant denied the tenants' right to assign, and stated that the tenancy granted to the first defendant firm was subject to a condition whereby the tenancy would be forfeited upon assignment. He stated that this was his usual practice and the custom in Kuala Lumpur, and pointed to a notice appearing on all his receipts reading: "Take notice that the landlord will recognise no tenancy unless direct from him", which accompanies another term setting out the agreed length of notice to terminate the tenancy. These two terms appear not only on the receipts of current rent, but on what is termed the deposit receipt given at the time of entering into possession of the premises. The learned Judge found that :—

> The effect of payment of the deposit and rents in exchange for receipts so worded might create a contractual obligation not to assign without consent, the breach of which would give rise to a claim for damages (although I do not decide this point); but it is in my opinion quite clear on the authorities (see **Shaw** v. **Coffin**[1]; **Crawley** v. **Price**[2]) that there is here no 'condition' the breach of which would give a right of re-entry.

Evidence as to payment of rent was given by the two partners of the second defendant firm only. The first stated that he paid. It appears that the second was the cashier. He said he paid the rent and went on to state that after October, 1944, he met the appellant's rent collector and asked him why he did not collect rents. The collector replied that he was not authorised to receive rent as he had not been given any signed receipts by the owner. The receipts were always made out in the name of the first defendant and accepted. On this the learned Judge found that the appellant had acquiesced in the assignment and consented thereto. He then went on to raise a point on the pleadings, expressing the opinion :—

> That it would not be permissible for the plaintiff to recover judgment as for a breach of condition on the plaint as it stands. Neither the condition itself nor any breach of it is alleged.....

It might seem, however, that pleading the assignment which is the breach of condition relied on, would depend on knowledge of its existence, and the assignment was, the Judge found, concealed.

Before us, the appellant relied on three grounds, arguing that the learned Judge was wrong in holding that the term against assignment might create a contractual obligation but was not a condition, that there was no evidence of appellant's acquiescence in respondents' alleged tenancy, and that the original tenancy remained voidable at his option and not void, so that he was entitled to avoid it on learning the true facts. The first was his one essential point. He submitted that the cases relied on by the learned Judge

were no authority for His Lordship's proposition, being merely cases in which the court found the term was a covenant, and not a condition. It is a question of ascertaining the true nature of the term, no precise form of words is necessary, *Doe dem. Henniker v. Watt*[3], but the court must decide whether it be in the nature of a definition of an event subsequent prescribed by the landlord defeating the grant, and terminating the tenancy, or a covenant, agreement, or promise by the tenant. The respondent relied on the cases cited by the learned Judge and on *Doe dem. Willson v. Phillips*[4]. He suggested that the provision was neither a condition nor a covenant but what he described as a notice, a term the legal connotation of which he left completely vague. He also suggested that *Doe v. Watt*[3] (above) laid down that the word "condition" was requisite to create one.

It is true that the word "conditioned" occurs in the memorandum of agreement in *Doe v. Watt*[3] above, and that Bayley J. relied on the use of that word in his judgment, but respondent ignores the opinion that no precise form of words is necessary and the argument of the judge that the use of the word defeated the presumption which might arise from the use of the word "stipulated" with it. In that case it was held a condition was created as was one in *Doe dem. Lockwood v. Clarke*[5] where the word "condition" is not mentioned and the language is quite different. *Shaw v. Coffin*[1] is decided on the same grounds as *Doe v. Phillips* (above) that the words are words of agreement by the tenant. *Crawley v. Price*[2] has really no bearing on this case. It turns on the application of a proviso for re-entry to one of several covenants which no one suggests the term here is. I am not, however, required in this case to go at length into the meaning which parties may be supposed to have attached to words used in a demise or agreement. The agreement in this case has never been reduced to writing. It is, as the learned Judge in effect found, to be ascertained from the words and acts of the parties and is evidenced, in part, by the note on the receipts given by the appellant and accepted by the defendants. The appellant relies on what, he says, is his practice and the Kuala Lumpur custom, and points to this notice on the receipts, including that taken on entering into possession, to show that this particular agreement was made subject to such condition. The first respondent himself said in cross-examination: "I knew that the receipts said I could not assign the tenancy." Over and above this, we have the finding of the learned Judge on what seems to me ample evidence that the first respondent's pretended occupation was "an attempt to evade the agreement not to assign the tenancy." He uses the word "agreement", but the act seems dictated by the fear that the tenancy would be forfeited were the truth known. In other words, he clearly understood it as a condition. I do not think the cases relied on by the learned Judge support his proposition. The wording on the receipt is clearly a term imposed by the landlord, and I think that the evidence and findings shew that the parties themselves understood the tenancy to be subject to a condition that it continued only while direct from the landlord, and that consequently an assignment would determine it.

Moreover, it may be observed that in *Elliott v. Johnson*[6] both Mellor & Lush JJ. were of opinion that a parole tenancy is not assignable without the consent of the landlord, the former observing :—

> It would seem to follow from **Buckworth v. Simpson**[7] that some act, such as payment and acceptance of rent must occur in order to create a binding tenancy between plaintiff and defendant. I think in this case if the landlord had done any act to shew that he accepted the assignee as his tenant, then a new tenancy would have been created on the terms of the old tenancy between defendant and Messrs. Elliott; but without some act done it appears to me to be contrary to every principle of law to assume that there is a liability which assignee could enforce as between himself and the original landlord. There is another point in the case, but upon that I do not think it necessary to give any opinion. Upon the short ground, that as the defendant has done no act to show that he assents to the plaintiff taking possession as a tenant from year to year upon the terms upon which the tenant who assigned to him held the premises, I think the plaintiff is not entitled to recover in this action.

While Lush J. said :—

> If there had been any facts in the case similar to those which existed in **Buckworth v. Simpson**[7] from which we could draw the inference that the landlord had consented to the substitution of the assignee in the place of the original tenants, that would have created a new contract between the plaintiff and the defendant; and then we could have drawn the inference that it would be on the same terms as that existing between the defendant and the original lessees. But those facts are altogether wanting, and the contention on behalf of the plaintiff, that a parole tenancy is to be put on the same footing as a tenancy created by indenture cannot be supported, and our judgment must be for the defendant.

These cases are concerned with parole tenancies but tenancies for year to year, a considerably more substantial interest in itself than the monthly tenancy here in question. Yet what the court is saying, as I understand it, is that in such case the relationship between the original parties is contractual rather than by tenure, and that the tenancy is a matter of agreement rather than of grant subject to certain conditions and covenants. There is in the tenant no substantial interest which, if he can't assign, he must surrender, an

interest which he cannot, if necessary, realise in cash. Nor do the arguments in favour of relieving for forfeiture, that the tenant loses a substantial interest for a trifling or inadvertant breach, apply. Consequently, in the circumstances contemplated, a new implied agreement may arise, but not an assignment of an existing interest. The Rent and Charged Land (Restriction) Enactment is intended to protect the occupying tenant and not to confer on him a new vested interest in the land which he can sell. The Contract Enactment contains no general provision as to assignment. *Pollock* (Indian Contract Act 6th Edition p. 263) cites the judgment of Collins M. R. in *Tolhurst v. Associated Portland Cement Manufacturers (1900) Limited*[8] as setting out the law applicable under the Indian Act :—

> Neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to some one else; this can only be brought about by the consent of all three, and involves the release of the original debtor..... On the other hand, it is equally clear that the benefit of a contract can be assigned, and wherever the consideration has been executed, and nothing more remains but to enforce the obligation against the party who has received the consideration, the right to enforce it can be assigned, and can be put in suit by the assignee in his own name after notice..... There is, however, another class of contracts where there are mutual obligations still to be enforced, and where it is impossible to say that the whole consideration has been executed. Contracts of this class cannot be assigned at all in the sense of discharging the original contractee and creating privity or quasi-privity with a substituted person....

The Indian law has made further provision as to chose in action, but a monthly tenancy so far as it is agreement, and this is its predominant character, is clearly one in which there are mutual obligations which are certainly not executed on the part of the tenant.

On the question of acquiescence, there are no definite findings of fact, and all the relevant facts do not appear to have been clearly ascertained, for instance, it is not clear if the Hock Hing board was put up in Chinese characters or if the name was in English as well in May 1941, or during the occupation. The presence of the first respondent's board is asserted but not admitted, though it would have seemed ascertainable and its age might have been apparent. This, it seems, was in Chinese only. In any case, both these are mere firm names and no indication of the persons liable. The learned Judge finds :—

> That for months the second defendant (a firm) in fact paid the rent of the premises to plaintiff's duly authorised rent collector, and I am unable to believe that the plaintiff was unaware that the second defendant had entered into possession of these premises and that they were so paying the rent to his collector. And the knowledge of the bill collector must in such circumstances be imputed to his principal.

The only circumstances apparent are the payments, but with respect to the Judge, the evidence seems to shew only a payment on the premises out of moneys of the second defendant firm. A tenancy is not implied from mere payment of rent but from acceptance with knowledge of and consent to the occupation. Here evidence of mere payment is made evidence also of knowledge and acquiescence. I understand the learned Judge's later thoughts to be his better, and the awareness of the plaintiff to be that imputed to him from the knowledge of his agent. The rent collector was never called and the *onus* of proving this knowledge was on the respondents. I think the learned Judge was wrong in imputing to the appellant the rent collector's knowledge, if any. It is not here only a question of what facts were known to the principal or agent, or should have been disclosed by one or other. It is a question of an owner's knowledge from which his consent to an agreement may be implied. The agent here was only a Malay rent collector. In the absence of definite evidence to the contrary it cannot be assumed that he had any authority to grant leases or to consent thereto. He said he had authority to collect rent only when given signed receipts. He is not a land agent. As Lord Halsbury said in *Blackburn v. Vigors*[9] :—

> Where the employment of the agent is such that in respect of the particular matter in question he really does represent the principal, the formula that the knowledge of the agent is his knowledge is I think correct, but it is obvious that that formula can only be applied when the words agent and principal are limited in their application.
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> To lay down as an abstract proposition of law that every agent, no matter how limited the scope of his agency, would bind every principal even by his acts, is obviously and upon the face of it absurd; and yet it is by the fallacious use of the word "agent" that plausibility is given to reasoning which requires the assumption of some such proposition.

So here, the rent collector's signature or consent could not have created a tenancy, and his mere knowledge certainly cannot. The whole argument on these points is on the wrong leg by reason of the second respondent's concealment or deception. Even in their application to the Rent Board they did not declare their title. In the court below they failed to prove that alleged. The consent of the landlord was never asked nor were any steps taken on assignment to enquire, as would be the correct practice, as to any breaches of covenant jeopardising the interest acquired. Assignment might be such a breach, and consent, may be, in some cases could not be unreasonably withheld.

Such considerations do not arise, as no consent was asked, except to shew that the prohibition was a condition.

The learned Judge also questioned whether the appellant could succeed on an argument based on the conditional termination of the tenancy, stating that the appellant relied in his statement of claim on the notice to quit. That notice is mentioned in the statement but as unserved. The plaintiff seems to have declared on all the facts as then known to him. That they were not better known is not necessarily his fault. Although second defendants had then taken proceedings before the Rent Board, there is no indication that they had ever stated by what title they justified their possession. The condition is raised by way of reply.

On these findings the appellant is entitled to the relief claimed. He is not debarred by Section 7 of the Rent and Charged Land (Restriction) Enactment, for the first respondent is, by virtue of his assignment, no longer the appellant's tenant or entitled to possession. The assignment divests him of his interest but is voidable at the appellant's option, or is void unless the appellant waives the effect of the condition and this is not the case here. The second respondents are trespassers.

The appellant claimed damages. I do not think it necessary to refer this case for these to be ascertained. No special damage is pleaded and I think the matter may be properly dealt with by ordering payment of mesne profits at the rate of the former rent for the period 1st October, 1945, to the date of judgment.

I would set aside the judgment of the lower Court and enter judgment for the plaintiff, order payment to him of mesne profits at the rate of the former rent for the period 1st October, 1945, until the date of this judgment, and award him his costs in this Court and in the lower Court — such costs to be taxed.

Appeal Allowed.